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SUPREME COURT OF THE UNITED STATES

October Term 1960

No. 83

MAX CARR, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, *Petitioner*

v.

R. A. YOUNG, *et al*, *Respondents*

ERNEST T. GEPHARDT, FOR HIMSELF AND OTHERS SIMILARLY SITUATED, *Petitioner*

v.

EVERETT TUCKER, JR., *et al*, *Respondents*

On Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinion of Court Below

The opinion of the Supreme Court of Arkansas (R. 130-135) is not yet reported in the official reports but appears in the unofficial reports in 331 S.W. 2d 701.

Jurisdiction

The decision of the Arkansas Supreme Court affirming the decree of the Pulaski County Chancery Court was rendered and judgment was entered on February 8, 1960 (R.130,135).

The date of the order denying the Petition for Rehearing was February 29, 1960 (R.137).

The petition for certiorari was filed May 6, 1960, and was granted June 20, 1960.

The jurisdiction of this Court rests on Title 28, U.S.C. Section 1257(3).

Question Presented

Arkansas by statute requires all educational personnel in public schools and institutions of higher learning to file annually an affidavit listing without limitation every organizational membership and regular contribution made for the past five years. The Arkansas Supreme Court construed this to require disclosure of membership in "a nudist colony", in "a drag-racing club", in "an association of atheists" and in "other organizations that might be listed almost without number". The organizational membership and contribution affidavit must be filed with the appropriate school governing body which is free to disclose the contents generally. The question presented is whether this statute on its face and as applied to a University music professor and a high-school vocational printing instructor (who have filed non-communist disclaimers), unconstitutionally deprives them of rights of speech, press, association, religion and academic freedom guaranteed by the Fourteenth Amendment.

Statute Involved

"Act 10 of the Second Extraordinary Session of 1958 of the General Assembly of Arkansas"

AN ACT TO PROVIDE ASSISTANCE IN THE ADMINISTRATION AND FINANCING OF PUBLIC SCHOOLS, AND TO REQUIRE AFFIDAVITS FROM ADMINISTRATIVE AND

PROFESSORIAL EMPLOYEES, INCLUDING SUPERINTENDENTS, PRINCIPALS, AND INSTRUCTORS OF THE ELEMENTARY AND SECONDARY SCHOOLS, AND COLLEGES AND UNIVERSITIES OF THE STATE OF ARKANSAS RELATIVE TO ALL INCORPORATED AND/OR UNINCORPORATED ASSOCIATIONS AND ORGANIZATIONS TO WHICH THEY HAVE BELONGED OR HAVE BEEN AFFILIATED WITH FOR THE PAST FIVE YEARS; TO PROVIDE PENALTIES FOR FAILURE TO COMPLY, AND FOR OTHER PURPOSES.

Be it Enacted by the General Assembly of the State of Arkansas:

SECTION 1. It is hereby declared that the purpose of this act is to provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds, and it is hereby determined that it will be beneficial to the public schools and institutions of higher learning and the State of Arkansas, if certain affidavits of membership are required as hereinafter provided.

SECTION 2. No superintendent, principal, or teacher shall be employed or elected in any elementary or secondary school by the district operating such school, and no instructor, professor, or other teacher shall be employed or elected in any institution of higher learning, or other educational institution supported wholly or in part by public funds, by the trustees or governing authority thereof, until, as a condition precedent to such employment, such superintendent, principal, teacher, instructor or professor shall have filed with such board of trustees or governing authority an affidavit as to the names and addresses of all incorporated and/or unincorporated associations and organizations that such superintendent, principal, teacher, instructor, professor,

or other teacher is presently paying, or within the past five years has paid regular dues, or to which the same is making or within the past five years has made regular contributions.

SECTION 3. Such affidavit may be in substantially the following form:

STATE OF ARKANSAS)
COUNTY OF)

I, (name of affiant), being an applicant for position of
at (name of school or institution), being first duly sworn, do hereby depose and say that I am now or have been within the past five years a member of the following organizations and no others:

(Names and addresses of organizations)
and further, that I am now paying, or within the past five years have paid, regular dues or made regular contributions to the following organizations and no others:

(Names and addresses of organizations)

Signature of Affiant

Subscribed and sworn to before me this
day of , 19 .

Signature and Title of Official

SECTION 4. Any contract entered into by any board of any school district, board of trustees of any institution of higher learning, or other educational institution

supported wholly or in part by public funds, or by any governing authority thereof, with any superintendent, principal, teacher, instructor, professor, or other instructional personnel, who shall not have filed the affidavit required in Section 2 hereof prior to the employment, or election of such person and prior to the making of such contracts, shall be null and void and no funds shall be paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel; any funds so paid under said contract to such superintendent, principal, teacher, instructor, professor, or other instructional personnel, may be recovered from the person receiving the same and or from the board of trustees or other governing authority by suit filed in the circuit court of the county in which such contract was made, and any judgment entered by such court in such cause of action shall be a personal judgment against the defendant therein and upon the official bonds made by such defendants, if any such bonds be in existence.

SECTION 5. Every person who shall wilfully file a false affidavit under the provisions of this act shall be guilty of perjury, shall be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), and in addition shall forfeit his license to teach in any of the schools, institutions of higher learning, or other educational institutions supported wholly or in part by public funds in this State. All penalties collected under the terms of this act shall be forwarded to the State Treasurer to be placed by him in the common public school fund.

SECTION 6. If any paragraph, sentence, clause, phrase, or word of this act shall be held to be unconstitutional for any reason, such holding of unconstitution-

ality shall not affect any other portion of this act; nothing contained herein, however, shall be construed so as to affect the validity of any contract entered into prior to the effective date of this act.

SECTION 7. It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this act is to assist in the solution of these problems and to provide for the more efficient administration of public education. Therefore, an emergency is hereby declared to exist, and this act being necessary for the preservation of the public peace, health and safety, shall take effect and be in force from the date of its approval.

This law became effective on September 12, 1958.

Statement of the Case

Prior to the reopening of Arkansas schools in the fall of 1958, and immediately following the decision of the United States Court of Appeals for the Eighth Circuit in *Cooper* v. *Aaron*, 257 F. 2d 33, concerning desegregation of the public high schools in Little Rock, Arkansas, the Governor of the State of Arkansas in August, 1958, called a Second Extraordinary Session of the General Assembly for the purpose of enacting anti-desegregation legislation (Pl. Ex. 4 R.96, 112. Pl. Ex. 5 R.97, 114).

At this session a number of measures were enacted to achieve the overall purpose of non-compliance with the decision in *Brown* v. *Board of Education*, 347 U. S.

483. One of these measures enacted was Act 10, the validity of which is here in issue. This statute provides that no person shall be employed in a teaching capacity in any public school or public institution of higher learning in the State of Arkansas unless he shall have executed an affidavit to be filed with appropriate school officials listing all organizations with which he had been associated through membership or contribution for the past five years. A new affidavit is required to be executed each year. Any contract entered into by a school governing board with a teacher who has not executed the required affidavit is made void, and no such teacher can be paid any compensation for services from public funds. Under the Act, the execution of a false affidavit constitutes perjury, with a penalty provided therefor of loss of teaching license and the imposition of a fine of from $500 to $1,000.00.

Petitioner Max Carr was an associate professor of music who had been on the faculty of the University of Arkansas since the fall of 1955. No question had ever been raised by the University administration as to his qualifications to continue teaching except his refusal to execute the affidavit required by Act 10 (R.52). Indeed, the President of the University testified that but for the requirements of Act 10, Carr's teaching services would be continued and were very much desired by the University (R.62,63).

Petitioner Ernest T. Gephardt had been a Vocational Printing Instructor at Central High School in Little Rock since August, 1957. No school authorities had ever criticized Gephardt's qualifications to continue teaching (R.69). The Superintendent of Schools of Little Rock testified that Gephardt's reemployment was recom-

mended by his principal and but for the requirements of Act 10 his employment as a teacher would be continued (R.80).

On June 10, 1959, petitioner Carr, recognizing that there are legitimate areas of inquiry by school authorities into the activities and associations of teachers, executed an affirmation (he being conscientiously opposed to taking an oath or swearing in any form) in which he listed his membership in professional organizations; denied ever having been a member of any subversive organization; and offering to answer any questions which the University authorities might constitutionally ask touching upon his qualifications to continue as a teacher (R.52-53). No question was ever raised as to his associations or activities (R.53).

A similar affidavit was executed by petitioner Gephardt and filed with the Little Rock School Board on May 4, 1959 (R.68-69). No question was ever raised as to his associations or activities (R.69).

Subsequently, both petitioners were informed that their non-compliance with Act 10 would render their continued employment as teachers impossible (R.64,80). The suit by petitioner Carr was instituted on June 10, 1959, against the Board of Trustees of the University of Arkansas, the President of the University and the Attorney General of Arkansas (R.2). The action by petitioner Gephardt was instituted on June 19, 1959, against the Little Rock Special School District and its Board of Directors, the Superintendent of Schools of Little Rock and the Attorney General of Arkansas (R.33).

Both suits were instituted as class actions seeking declaratory judgments that Act 10 is unconstitutional and for injunctive relief against its enforcement (R.8,

40). Both complaints attacked the statute as depriving petitioners and the class they represent of liberty and property without due process of law, of the equal protection of the laws, and rights of speech and of association (R.7,39).

Since the issues were the same in both cases, they were consolidated for hearing on June 25, 1959, in the Chancery Court of Pulaski County, Arkansas (R.51). At the conclusion of the hearing, the Chancery Court sustained the validity of the statute (R.99). The formal decree dismissing the actions as to the Attorney General of Arkansas and upholding the constitutionality of Act 10 was entered September 22, 1959, *nunc pro tunc* as of June 25, 1959 (R.48-50).

The Supreme Court of Arkansas affirmed the decree of the Pulaski Chancery Court sustaining the validity of the challenged statute on February 8, 1960 (R.130,135).

Summary of Argument

Act 10—with its provision to annually force teachers to disclose, without assurance of confidentiality, religious, political, fraternal, social, recreational and every other kind of association—goes beyond any intrusion upon the rights of academic freedom and of free association yet approved by this Court.

It is recognized that school authorities have a right to inquire of teachers concerning matters touching upon their fitness and loyalty. *Adler* v. *Board of Education*, 342 U. S. 485; *Beilan* v. *Board of Education*, 357 U. S. 399. The broadside requirements of disclosure under Act 10 are not designed to meet this legitimate end, but rather to create an atmosphere of fear and intimidation in which members of the teaching profession will be de-

terred from exercising their constitutional rights. As such, the statute does not meet the constitutional test of imposing the narrowest restriction on individual freedom that is necessary to meet the supposed evil. See *Cantwell v. Connecticut*, 310 U. S. 296; *Thornhill v. Alabama*, 310 U. S. 88.

Although enacted as a part of a legislative program to achieve non-compliance with the decision in *Brown v. Board of Education*, 347 U. S. 483, the effects of the Act are more far-reaching. The exact opposite of the free academic atmosphere envisioned in *Sweezy v. New Hampshire*, 354 U. S. 234, is the inevitable product of the enforcement of Act 10.

No showing of necessity in the public interest for such a sweeping invasion of the teacher's rights has been made by the State. The language of the Act itself clearly demonstrates that its real purpose is to ferret out teachers who have the temerity to favor compliance with the school desegregation cases.

Although the Act does not provide for automatic dismissal of teachers because of organizational memberships or contributions, the natural result will be that teachers will avoid currently unpopular associations in order to insure renewal of their annual contracts of employment, and in order not to be subjected to abuse and pressure from outside private groups who disapprove of any causes the teacher might espouse. Teachers are thus deprived of their rights of free association. See *N.A.A.C.P. v. Alabama*, 357 U. S. 449; *Bates v. City of Little Rock*, 361 U. S. 516.

In furnishing their administrative superiors with an affirmation and affidavit, respectively, offering to answer any questions concerning their associations and ac-

tivities which might affect their fitness for continued teaching, petitioners have complied with any requirement which the State may constitutionally make under the decisions in *Adler* and *Beilan*.

On its face and as applied to these petitioners, Act 10 should be invalidated.

Argument

Act 10 Unconstitutionally Deprives Public School Teachers of Rights of Speech, Association, Religion and Academic Freedom Guaranteed by the Fourteenth Amendment.

Act 10 was enacted as part of a "package" in the Second Extraordinary Session of the Arkansas General Assembly of 1958, called by Governor Orval E. Faubus following the decision by the United States Court of Appeals for the Eighth Circuit, reversing the District Court order postponing integration in Little Rock Central High School. *Cooper v. Aaron*, 257 F. 2d 33 (8th Cir., 1958). The Governor's Proclamation recited that "Conditions exist that in my judgment and in my opinion, seriously endanger public education in the State of Arkansas, and the peace and tranquility of this State." (Pl. Ex. 4; R. 96, 112). The Governor told the opening session of the Legislature that they were met to consider problems not of their own making but problems forced upon the State by the unwise actions of others (Pl. Ex. 5; R.97,114). Governor Faubus continued in his address: "The NAACP objective of the moment is the successful integration of Central High School . . . This is not a half serious problem, and it cannot be met with half measures. The bills I have recommended to you are the product of many fine and able minds, and represent a great deal of hard work. I ask that you consider these measures as a package program" (R.121-124).

While it is true that Act 10 was not one of the measures specifically mentioned by the Governor in his "package", it was a part of the enlarged package enacted at the same time by the Arkansas Legislature to achieve the over-all purpose of noncompliance with the decision in *Brown v. Board of Education*, 347 U. S. 483.

"Interposition", impeachment resolutions, school closing, public education by private institutions, and champerty laws are some of the techniques utilized to resist efforts at compliance with this Court's decisions in regard to desegregation in the public schools. One such device, *exposure*, has been widely utilized throughout the South to hamstring the effectiveness of organizations dedicated to effectuation of this Court's decision in *Brown*. Tax proceedings against the NAACP with the demand for the membership lists is one form of exposure. See *N.A.A.C.P. v. Alabama*, 357 U. S. 449, and *Bates v. City of Little Rock*, 361 U. S. 516. State legislative investigation committees with power to subpoena NAACP members and sympathizers is another form of known exposure. See *Scull v. Virginia*, 359 U. S. 344. The device in issue here, that is, to require all teachers to list their organizational memberships and contributions is another route to the same destination. It is simply a vehicle to be used for ending any public school teacher's participation in any group favoring compliance with this Court's decisions in regard to desegregation.

Petitioners make no contention that their rights of free association, of academic freedom and other rights guaranteed by the Fourteenth Amendment are limitless. The State may certainly make some inquiry into the past and present associations and activities of public employees generally, and teachers specifically, in order to insure

their loyalty, character, general fitness, trustworthiness and professional competence. See *Adler* v. *Board of Education*, 342 U. S. 485; *Garner* v. *Los Angeles Board of Public Works*, 341 U. S. 716; *Beilan* v. *Board of Education of Philadelphia*, 357 U. S. 399; *Lerner* v. *Casey*, 357 U. S. 468; *Slochower* v. *Board of Education*, 350 U. S. 551. But just as there are limits to the exercise of one's rights, there are limits to their permissible restriction by the State. Such permissible restrictions must be justified by some clear and present public interest. See *Thomas* v. *Collins*, 323 U. S. 516, 530; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449.

The proper function of schools, colleges and universities is to teach, not only familiar facts, but also to extend the boundaries of knowledge and to develop the intelligence and mental power of youth. To accomplish this a high degree of freedom of research, of teaching, of learning and of association for these purposes is indispensable. The restrictive effects of Act 10 on the individual rights of teachers is not the only issue involved. Of equal concern is the interest of the school children of Arkansas and the public generally that there be maintained a school system which is free from any unnecessary influence of fear and intimidation. The essentiality of this freedom was recognized by this Court in *Sweezy* v. *New Hampshire*, 354 U. S. 234, where the Court said, at p. 250:

> "No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any straight jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the

"social sciencies where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." See also *Wieman v. Updegraff*, 344 U. S. 183.

In sustaining the validity of Act 10, the Arkansas Supreme Court based its decision upon cases decided by this Court. *Adler* v. *Board of Education*, *supra*; *Garner* v. *Los Angeles Board of Public Works*, *supra*.

In its opinion the court below said:

> "In the *Adler* case the statute was directed only at subversion, but the court's language dealt repeatedly with fitness as well as with loyalty. We have no doubt that a school board might ask an applicant whether he belonged, specifically, to the Communist Party, to any organization dedicated to the violent overthrow of the government, to a nudist colony, to a drag-racing club, to an association of atheists, or to other organizations that might be listed almost without number, membership in which might shed light upon the applicant's fitness to guide young minds in the schoolroom. We are not persuaded that the constitution compels the board to ask scores or hundreds of permissible questions one by one, instead of making the blanket inquiry required by Act 10."

The Arkansas court's reliance on this Court's decisions in *Adler* and *Garner* is entirely misplaced. The results in those cases were reached by balancing the dangers of forced disclosure against the evils of communism and justified by compelling public necessity. See *Barenblatt* v. *United States*, 360 U. S. 109. As in those cases, the Court is now confronted with the problem of balanc-

ing the clash between the individual teacher's rights and the State's asserted justification for the invasion of these rights under the provisions of Act 10.

What then is the public interest which is sought to be protected by the affidavit requirements of this Act?

It is stated in Section 1 of Act 10 that the purpose of the Act is to "provide assistance in the administration and financing of the public schools of Arkansas, and institutions of higher learning supported wholly or in part by public funds." There is also stated the legislative determination that the filing of the required affidavits of membership will be beneficial to the public schools and institutions of higher learning in the State of Arkansas. The Act contains no reference to teacher loyalty, trustworthiness, suitability, fitness or professional competence.

Section 7 of the Act, the emergency clause, comes closer to a statement of the real purpose for which this legislation was enacted. That section reads: "It is hereby determined that the decisions of the United States Supreme Court in the school segregation cases require solution of a great variety of local public school problems of considerable complexity immediately, and which involve the health, safety and general welfare of the people of the State of Arkansas, and that the purpose of this Act is to assist in the solution of these problems and to provide for the more efficient administration of public education."

There could be no possible legitimate connection between the solution of local school problems created by this Court's school segregation decisions and the affidavits required under the terms of Act 10. The purpose here is scarcely veiled. It is implicit in the language of

Section 7 that the purpose of the Act is to resist compliance with *Brown* v. *Board of Education*, *supra*. Hence, the purpose of the Act as declared by the Legislature itself, is one of those attempts condemned in *Cooper* v. *Aaron*, 358 U. S. 1, 17, in the following language:

> "Evasive schemes for segregation whether attempted 'ingeniously or ingenuously'."

No relationship between the asserted benefit in the administration and financing of public schools and the restrictions upon teachers' rights under the provisions of Act 10 has been shown. On the contrary the only evidence in the record shows that the requirements of Act 10 are not necessary in the proper administration and preservation of the integrity of the schools in Arkansas. The President of the University of Arkansas testified that he did not know of any school bodies, teachers' associations, or administrative heads of schools that sought the enactment of Act 10 (R.64). When asked by Attorney General Bennett whether the information called for in Act 10 would be of further value in screening applicants for teaching jobs, the President of the University answered in the negative (R.65).

In sustaining the validity on its face of Act 10, the Arkansas Supreme Court recognized that its use in a discriminatory manner might make the statute invalid in application. It was argued by respondents that there is no infringement of petitioners' rights, since Act 10 does not provide for any automatic dismissal because of any organization to which petitioners may have belonged or to which they may have contributed. It is true that the Act does not provide for such automatic dismissal, nor is membership in any particular organization proscribed. It is equally true, however, that the Act does not provide that the affidavits filed or the information contained

therein should be held in confidence by the school authorities with whom the affidavits are filed. The official opinion of the Attorney General of Arkansas to the secretary of the Little Rock School Board on April 21, 1959, stated: "It is an administrative determination, to be made by the respective boards, as to the disclosure of information contained in the affidavits." (Pl. Ex. 2; R. 56,102). Consequently, any school governing body on its own, or when subjected to public pressure, may well make public such affidavits, in whole or in part.

On April 12, 1959, state-wide publicity was given in the Arkansas Gazette, a Little Rock daily newspaper, to the fact that the Capital Citizens Council, a segregationist organization, was going to photostat copies of the affidavits filed under Act 10 at several state colleges and all of the high schools in Arkansas that have integration, with the exception of Little Rock. Little Rock was not on the list because the representative of the Citizens Council had been assured by several members of the Little Rock School Board that the records would be made public (R.11).

At the trial, Amis Guthridge, attorney for and a board member of, the Capital Citizens Council, who had made the statements publicized in the press, testified that his group would seek to obtain information in regard to organizations to which teachers belonged, and would attempt to have discharged teachers who had supported organizations unpopular with the Citizens Councils (R.91). This witness further described the Capital Citizens Council as an organization dedicated to legal non-compliance with decisions which this Court rendered in regard to school desegregation under usurped authority that it does not possess (R.88). Among such organizations unpopular with the Citizens Council were named

the American Civil Liberties Union, the Urban League, the American Association of University Professors, and the Women's Emergency Committee to Open Our Public Schools in Little Rock (R.91,93). Guthridge further testified that within the State there is an Association of Citizens Councils of Arkansas, and that this State Association is affiliated with the Citizens Councils of America (R.87). There are approximately 40 to 50 Citizens Councils scattered throughout the State of Arkansas (R.88).

In commenting on this testimony and the use to which the information obtained through the Act 10 affidavits would be put, the Arkansas Supreme Court said:

> "The appellants' third witness, Guthridge, testified that he was a director of, and attorney for, the Capital Citizens' Council, which he describes as an organization advocating states rights and racial integrity and opposing by all lawful means the desegregation decisions of the United States Supreme Court. Guthridge was interrogated by the appellants' counsel about newspaper accounts of public statements he had made concerning Act 10. In those statements, which Guthridge reaffirmed on the witness stand, he said that his organization and similar ones in the state meant to attempt to gain access to some of the Act 10 affidavits with a view to seeking to eliminate from the school system teachers who belonged or contributed to the N.A.A.C.P., the Urban League, and other organizations opposed by the Citizens Councils.
>
> "We do not think this testimony sufficient to show that the act will be applied by the state and its agencies in such a way as to violate the appellants' constitutional rights."

We submit that the court below fell into error in assuming that direct action by a state agency under a challenged statute is necessary to the invalidity of such statute.

This Court has frequently recognized that an indirect restraint upon the exercise of constitutional rights may be just as effective and invalid as a direct one. See *N.A.A.C.P.* v. *Alabama, supra; American Communications Association* v. *Douds*, 339 U. S. 382; *Watkins* v. *United States*, 354 U. S. 178; *Bates* v. *City of Little Rock, supra.*

It is clear then that a statute which compels disclosure of associations may be unconstitutional without further direct governmental action of a punitive nature, if the governmentally forced disclosure sets in motion private action which has the effect of depriving one of his constitutional rights. The crucial factor is the interplay of governmental and private action, *N.A.A.C.P.* v. *Alabama, supra.*

Teaching appointments throughout Arkansas are for a one year term. Local school board members are elected by the people with periodic expiration of terms, varying from district to district. The boards of trustees of the various State colleges and the University are for staggered terms, with at least one membership expiring annually.

The Arkansas Supreme Court, in commenting upon the testimony in the cases at bar that presently the information contained in the Act 10 affidavits is being held confidential, overlooked the reality of the constant threat to teachers of possible future exposure. At any moment a governing school board may change its policy or a change in personnel may result in the adoption of a policy

of publicizing teachers' associations. The record discloses that, although when these cases were tried on June 25, 1959, the Little Rock School Board was treating the affidavit information as confidential, this was not true when the Board was differently constituted on April 12, 1959 (R.11,77-78). Petitioner Gephardt's testimony makes it clear that teachers at that date had no assurance of the confidentiality of the information sought.

From the spate of litigation arising as a result of desegregation decisions in various fields, this Court is bound to take notice of the fact that resistance to compliance with ending segregation is the popular position in the South. School governing authorities know this and teachers know it as well. In this situation, the effect of Act 10 is to create a constant threat that, either immediately or at some future time, teachers' contributions to or affiliation with unpopular organizations may cause their discharge. The inevitable result is that teachers, in order to assure their continued livelihood in their chosen profession, will carefully avoid any possibly unpopular affiliations. The consequence to the southern teacher is disaster. Either he leaves the South as did some Arkansas professors, see "Aid to the Arkansas Professors", 46 AAUP Bulletin 19 (1960), or he remains in the South without engaging in thought, for thinking leads to action, and in this day and age, action leads to organizational membership and support.

Had the object of Act 10 actually been to provide needed information for the maintenance of a proper public school system, it would have been a simple matter for the Legislature to have given school authorities power to obtain such information as this Court has held to be relevant, and to have provided that such information be kept confidential, not unnecessarily disclosed. As stated in *N.A.A.C.P.* v. *Alabama*, *supra*, at p.462:

> "Inviolability of privacy in group association may in many circumstances be indispensible to preservation of freedom of association, particularly where a group espouses dissident beliefs."

The non-confidential feature of Act 10 alone distinguishes this case from *Beilan, supra*, where the court pointed out in its opinion, at p. 401, that the interviews with the Superintendent "were given no publicity and were attended only by petitioner, his superintendent and the assistant solicitor of the board."

Making available information which might indicate that members of the teaching profession favor compliance with the law of the land is not a legitimate end of legislation. The proper purposes of academic freedom and individual constitutional rights may have to accommodate themselves to the compelling interests of national security, but they should not be subordinated to such ingenuous attempts to subvert the law.

Absent any showing that the broadscale invasion of privacy under Act 10 is necessary to meet any supposed evil sought to be corrected by the State, the Act's restrictions on academic freedom and freedom of association render it unconstitutional on its face. See *Thornhill* v. *Alabama*, 310 U. S. 88; *Cantwell* v. *Connecticut*, 310 U.S. 296; *Carlson* v. *California*, 310 U. S. 106; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287.

Even assuming that Act 10 is on its face a valid statute, as applied to petitioners it is unconstitutional. The only legitimate justification for the State to probe into the organizational memberships and contributions of public school teachers is to aid in determining their fitness to serve as teachers. In recognizing this, the Supreme Court of Arkansas in its opinion (R.132) quoted this language from *Adler* v. *Board of Education, supra*:

> "That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty."

The same language was also relied upon by the United States District Court in its opinion in *Shelton* v *McKinley*, 174 F. Supp. 351 (E.D. Ark.), upholding the validity of Act 10.

In the cases at bar there is no question of petitioners having refused to answer inquiries by school authorities touching upon their fitness and loyalty. Both petitioners, as has already been stated, filed statements listing the professional organizations to which they had belonged, and denying past or present membership in any subversive organization (R.52,69). They further offered to answer any questions in regard to any matter, including their associations and activities, which might be relevant concerning their qualifications to continue as teachers (R.52-53,69). No school official ever raised any question about the associations or activities of either petitioner Carr or Gephardt (R.53,69).

The President of the University of Arkansas testified at the trial that petitioner Carr's performance of duties had been in every way satisfactory and that he and other members of the administration had urged Carr to stay on the faculty (R.63). Only Carr's refusal to execute the full affidavit required by Act 10, which the President felt was not needed in screening applicants for teaching jobs (R.65), was responsible for his pending dismissal (R.52).

As to petitioner Gephardt, the Superintendent of Schools in Little Rock testified that Gephardt's reemployment was recommended by his principal, and that no complaint had been received about his teaching ability or any of his associations. But for Act 10 he would not be discharged (R.80).

In this situation, the following language in the Court's opinion in *Beilan* v. *Board of Education*, *supra*, at p. 405 is particularly pertinent:

> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him by his employing Board examining into his fitness to serve it as a public school teacher."

We earnestly urge that petitioners have fulfilled these obligations of frankness, candor and cooperation. We respectfully submit that *Adler* and *Beilan* should not be extended to protect the unjustified onslaught on academic freedom and the right of free association shown by the record in these cases, and that the Court should hold that these petitioners have been deprived of their rights under the Fourteenth Amendment.

Conclusion

Wherefore, for the reasons hereinabove stated, the judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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